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REPORT TO THE HONORABLE  
MAYOR AND CITY COUNCIL

**ADOPTION OF ORDINANCE RELATING TO JUVENILE CURFEW**

Since 1947, the City of San Diego has had a law (San Diego Municipal Code sections 58.01, 58.01.1 and 58.01.2) setting a curfew for juveniles under the age of eighteen (18). On June 9, 1997, the United States Court of Appeals for the Ninth Circuit ruled that San Diego's curfew ordinance was unconstitutionally vague and overreaching. Although the time for appealing that decision has not yet expired, this office has been asked by Mayor Susan Golding to prepare an ordinance to amend and replace the existing curfew ordinance, to meet the Ninth Circuit's criticisms and thereby constitute an enforceable curfew law.

The attached ordinance has been prepared to conform substantially to the Dallas, Texas curfew ordinance, which was found to be constitutional by the Fifth Circuit Court of Appeals in Outb v. Strauss, 11 F.3d 488 (5th Cir. 1993). The provisions of that ordinance, and the opinion of the Fifth Circuit, were cited with approval by the Ninth Circuit in the City's case. The provisions of that ordinance also are substantially reproduced in the San Diego Police Department Procedure for enforcement of our existing curfew ordinance, meaning that enactment of the proposed ordinance will not substantially change the current guidelines followed by the Police Department. Below is a comparison of the City's current curfew ordinance and the proposed ordinance, and a comparison of the proposed ordinance and the San Diego Police Department's current curfew enforcement policy.

**A. Comparison of the City's 1947 Ordinance to the Proposed Ordinance**

The City's existing 1947 ordinance differs from the proposed ordinance in two significant respects:

1. The existing ordinance makes it unlawful for a minor to "loiter, idle, wander, stroll or play." The Ninth Circuit found this language unconstitutionally vague, on the grounds that it too imprecisely defined the prohibited conduct, and thereby did not give minors adequate notice of

what would and would not be allowed. This vagueness also, in the Court's opinion, gave the police too much discretion to decide which conduct in any given situation was illegal.

The conduct that is illegal under the new ordinance is "to be present" on public property or on the premises of an "establishment," as defined. The defenses listed then become exceptions to this "presence" prohibition.

2. The exceptions in the existing ordinance were too narrow to accommodate the constitutional rights of the minors and their parents. The existing ordinance carves out exceptions for instances in which the minor is: a) accompanied by a parent or guardian, b) upon an emergency errand at the direction of the parent or guardian, c) returning directly home from a meeting, entertainment or recreational activity directed by local educational authorities, or d) when the minor's presence is connected to a legitimate business, trade, profession or occupation in which the minor is engaged. The Ninth Circuit found these exceptions too narrow an intrusion into the constitutional rights of both the minor, and of the parents who have the right to control their children's conduct.

The new ordinance, substantially mirroring Dallas' ordinance, provides wider latitude for minors' activity that has been sanctioned by parents or guardians. It broadens the scope of legitimate social activities in which a minor may be engaged, and contemplates the situation where a minor is simply sitting out in front of his or her own home. Importantly, it also incorporates a specific recognition and exception for the minor's exercise of First Amendment rights, which the Ninth Circuit found to be an important consideration (expressly citing the Fifth Circuit's decision upholding the Dallas ordinance), and the constitutional right to some freedom of movement<sup>1</sup>. Defining a legitimate exercise of First Amendment rights will have to be done on a case-by-case basis, weighing the minor's right to engage in the specific activity involved in the case against the City's compelling interest in preserving the public health, safety and welfare (including that of the minor involved) by enforcing the ordinance. Having the recognized exception in the ordinance, however, should satisfy a reviewing court that the minor is ensured of an opportunity to defend against a charge of curfew violation.

Further, it adds the Dallas ordinance's recognition that some minors have been emancipated under law and therefore should not be subject to the same laws as unemancipated minors. This difference was discussed only in a footnote in the Ninth Circuit's opinion, but we recommend it be included to round out the broad list of exceptions the Ninth Circuit found acceptable.

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<sup>1</sup>The exception is for minors found "in a motor vehicle involved in interstate travel." The phrase "interstate travel" means any situation in which the travel includes crossing one or more state lines.

In general, the categories of exceptions in the new ordinance are broader (and address specific constitutional concerns the Ninth Circuit raised) than in the existing ordinance; further, the definition of the conduct constituting the offense is narrower and easier to objectively define. The Ninth Circuit repeatedly cites with approval the Fifth Circuit's decision in Qutb, and the proposed ordinance has been conformed in those important respects to the Dallas ordinance to meet the concerns of the Ninth Circuit.

#### **B. Comparison between the Proposed Ordinance and Existing Police Department Policy**

As stated above, the Police Department has already incorporated the Dallas ordinance's guidelines and exceptions into its enforcement procedures. There are a few differences of which you should be aware:

1. The proposed ordinance defines a "responsible adult" as a person eighteen years of age or older, which tracks the Dallas ordinance. The Police Department Policy follows the direction of the Juvenile Court and defines a "responsible adult" as a person at least twenty-one years old.
2. The proposed ordinance includes an exception for minors who are on the sidewalk abutting their own home. The Police Department procedure incorporates the slightly broader exception, extending this to the sidewalk of a next-door neighbor's home as well.
3. The proposed ordinance includes as one of the exceptions "emancipation pursuant to law." The Police Department procedure adopts Dallas' language to include an exception if "the minor is married or has been married or had disabilities of minority removed, in accordance with California Rules of Court, Rule 270." This is slightly narrower than the proposed ordinance insofar as the proposed ordinance would recognize the legitimate emancipation of a minor under any state law.

None of these variances are fatal to the constitutionality of the proposed ordinance, and it remains a policy call for the Mayor and Council to determine which direction the ordinance should take on each point.

You should also note that we have prepared both an emergency ordinance, and a companion ordinance. The companion ordinance is substantively the same as the emergency ordinance but would take effect in the normal course of the process. This is because, while we believe that grounds exist for implementation of this ordinance as an emergency measure under Section 17 of the City Charter, we are mindful that such ordinances are sometimes challenged on

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the grounds that a true emergency does not exist. In an abundance of caution, we propose that, if you adopt the emergency ordinance, you also adopt the "normal course" ordinance so that regardless of any challenge to the former, you will have a curfew ordinance in effect within 45 days.

Respectfully submitted,

CASEY GWINN  
City Attorney

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Attachments  
RC-97-9